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January 20, 2022

**VIA FIRST CLASS MAIL AND ELECTRONIC MAIL**

Ms. Julia Haas  
Mr. Kevin Maloney  
Environmental Appeals Board  
89 King Highway  
Dover, DE 19801

**Re: Amended Statement of Appeal of Walter F. Curran  
(EAB Docket No. 2021-10)**

Dear Ms. Haas and Mr. Maloney:

Enclosed for filing please find the Amended Statement of Appeal of Walter F. Curran, challenging the Secretary's Order No.: 2021-W/CCE-0026. This amended version of Mr. Curran's original appeal, which was filed on October 20, 2021, does only the following: (i) slightly modifies original paragraph 38 (now paragraph 41); and (ii) adds new paragraphs 25-27, resulting in a renumbering of the paragraphs that follow.

In an effort to make clear what changes have been made in the Amended Statement of Appeal, enclosed you will find: (1) the Amended Statement of Appeal showing the changes, in redline, that have been made to the original Statement of Appeal; and (2) a "clean" version of the Amended Statement of Appeal. Also enclosed is a certificate of service for this filing.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

*/s/ Michelle M. Skjoldal*

Michelle M. Skjoldal

*Counsel for Walter F. Curran*



MMS  
Enclosures

CC: Dean Holden, EAB Chair  
Devera Scott, Esq.  
William Kassab, Esq.  
Thomas Hanson, Jr., Esq.  
William Burton, Esq.  
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**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
FOR THE STATE OF DELAWARE**

In the Matter of )  
 ) **EAB No. 2021 - 10**  
SECRETARY'S ORDER No. 2021-W/CCE-0026 )

**AMENDED STATEMENT OF APPEAL OF WALTER F. CURRAN**

Pursuant to 7 Del. C. § 6008(a) and 7 Del. Admin. Code Sec. 105, Appellant Walter F. Curran ("Appellant" or "Mr. Curran"), by and through his undersigned counsel, submits this amended written statement of appeal to the Delaware Environmental Appeals Board, challenging the Secretary's Order No.: 2021-W/CCE-0026, dated September 30, 2021, ("Order"), which approves the DNREC Division of Water, Wetlands and Subaqueous Lands Section ("WSLS") Permit Application for a Subaqueous Lands Permit of Diamond State Port Corporation ("DSPC" or "Applicant"), and the Federal Consistency Certification from the Division of Climate, Coastal and Energy's Delaware Coastal Management Program ("DCMP") with respect to the United States Army Corps of Engineers ("USACE") authorizations also required for DSPC's proposed project. A copy of the Order being appealed is attached hereto as Exhibit A.

Mr. Curran has interests that have been substantially affected by the Secretary's Order, which are discussed more fully below. The Order is improper, and the Secretary, in issuing the Order, has acted arbitrarily, capriciously, contrary to law, and in abuse of his discretion, as explained below.

**I. Background**

**a. Overview of Proposed Project and Procedural History**

1. The proposed project involves the construction of a new container port on the Delaware River at the former location of the DuPont Edgemoor (Chemours) site (the "DSPC Project"), and includes building a 2600-foot long wharf structure, dredging the berth and access channel to a depth of 45 feet below mean lower low water (which involves dredging over 80 acres of river bed and approximately 3.3 million cubic yards of river sediments and underlying soil), installing a bulkhead along 3,200 feet of shore line, and permanently filling in over 5.5 acres of subaqueous lands. DSPC's Application indicates that the proposed container port will require annual maintenance dredging of 500,000 cu. yd., though a study prepared by one of DSPC's consultants in May 2020 disclosed that the amount could be as much 610,000 cu. yd. Additionally, subsequent changes to DSPC's plans may have increased this amount significantly.

2. The DSPC Project is located adjacent to and north of the federal navigation channel, in the southern portion of Reach B of the Delaware River, at the intersection of the Cherry Island and Bellevue Ranges, and is offshore of the Applicant's property, as described above. DSPC Project plans include a proposed new turning basin which occupies the Delaware

River Main Navigation Channel, which is utilized by all upbound and downbound ships heading to or from ports further north on the Delaware River.

3. DSPC submitted to the Delaware Department of Natural Resources and Environmental Control (“DNREC”), on or about March 16, 2020, an Application and supporting documents seeking a Subaqueous Lands Permit (“Permit”) and Federal Consistency Certification (“Certification”). A Joint Public Notice was issued on August 23, 2020. The Application and some supporting documents were made available to the public through DNREC’s website. A virtual public hearing was held on September 29, 2020 and the public was allowed to submit comments through December 1, 2020. Mr. Curran submitted timely comments regarding the DSPC Project to the agency, which are incorporated by reference as if fully set forth herein. A copy of Mr. Curran’s comments is attached hereto as Exhibit B.

4. On September 30, 2021, the Secretary issued the Order approving issuance of the Permit and Certification. This Statement of Appeal is timely filed in accordance with 7 Del. C. § 6008(a) and Section 1.1 of the Regulations of the Environmental Appeals Board.

## II. Basis for Appeal

### a. The Interests Which Have Been Substantially Affected

5. Mr. Curran is a “person whose interest is substantially affected by” an “action of the Secretary” and is therefore entitled to bring this appeal under 7 Del. C. § 6008(a). A party is required to show an injury in fact, and that such injury is within the zone of interest sought to be protected by the statute. *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 904 (1994).

6. The Secretary’s Order, in authorizing the activity that it does, will improperly interfere with Mr. Curran’s use and enjoyment of the Delaware River, and therefore substantially affects his interests.

7. As Mr. Curran states in his comments submitted on October 30, 2020, he has “worked on the Delaware River, fished on the River and boated on the River” and he appreciates “its value, not just for commerce, but also beauty and enjoyment.” For over 40 years, Mr. Curran served as a Stevedore/Marine Terminal operator in the ports of Boston, Baltimore, Philadelphia, Jacksonville and San Juan, Puerto Rico. Appellant is a long-time resident of the State of Delaware and his use and enjoyment of the Delaware River spans three decades. Starting in 1989, he was employed at Holt Cargo Systems, Inc. as Director of Stevedoring in charge of stevedoring and terminal operations at both Packer Ave. Marine Terminal and Gloucester Marine Terminal. He also conducted stevedoring and terminal operations at Tioga Terminal, and the SJPC's Broadway and Becket Street terminals. In 2002, Mr. Curran became a consultant and contracted to be General Manager of Gloucester Terminals, LLC until his retirement in December 2011. Since 1989, Mr. Curran has frequently fished in and boated on, and has occasionally swam in, the Delaware River in the area of the DSPC Project. He intends to continue boating and fishing activities on the Delaware River in the area of the DSPC Project in the future.

8. Mr. Curran's interests have been substantially affected by the Order and the issuance of the Permit and Certification. The location of the proposed DSPC Project, including the area in the Main Navigation Channel of its proposed turning basin, impacts his ability to safely navigate those waters while on boating and fishing trips. It is substantially likely that the proposed DSPC Project, including the new turning basin, will cause delays, travel restrictions, safety concerns, and other impediments to boats using the Delaware River, including boats utilized by Mr. Curran. The likelihood that ships using the docks related to the proposed DSPC Project will cause navigation and safety issues in the Delaware River constitutes injury in fact to Mr. Curran. Additionally, the DSPC Project will create a variety of adverse impacts to the environment and to natural resources, including but not limited to those related to water quality, air, and noise, as well as the health and presence of aquatic life, such as the finfish necessary for recreational fishing, all of which constitute an injury in fact to Mr. Curran by way of his recreational activities on the Delaware River. See Jones Declaration, attached as Exhibit C. In sum, the Secretary's Order has caused Appellant to suffer an injury in fact that is concrete, particularized, and imminent.

9. Mr. Curran's interest in the continued safe use of a public waterway and the navigability of the Delaware River and the Main Navigation Channel, as well as maintaining the environmental integrity and recreational uses of the Delaware River, are within the "zone of interests" sought to be protected by The Subaqueous Lands Act, the Regulations Governing the Use of Subaqueous Lands, the federal Coastal Zone Management Act (16 U.S.C. §§ 1451 to 1466) (the "CZMA") and its implementing regulations, and the Delaware Coastal Management Program Federal Consistency Policies and Procedures (7 Del. Admin. C. § 2201). For example, and notably, the Regulations Governing the Use of Subaqueous Lands state: "Subaqueous lands within the boundaries of Delaware constitute an important resource of the State and require protection against uses or changes which may impair the public interest in the use of tidal or navigable waters." 7 Del. Admin. C. § 7504.

10. Furthermore, DNREC must consider "[t]he potential effect on the public with respect to commerce, navigation, recreation, aesthetic enjoyment, natural resources, and other uses of the subaqueous lands." 7 Del. Admin. C. § 7504-4.6.3. DNREC must also consider any effect on "shellfishing, finfishing, or other recreational activities, and existing or designated water uses"; "harm to aquatic or tidal vegetation, benthic organisms or other flora and fauna and their habitats"; and "impairment of air quality, either temporarily or permanently, including noise, odors, and hazardous chemicals" among other items. 7 Del. Admin. C. § 7504-4.7. In assessing the impact of a dredging project, DNREC must consider the environmental impacts "at and surrounding the dredging site(s)," as well as "[a]ny environmental effects of the disposal of the dredged materials at and surrounding the disposal or fill site(s)." 7 Del. Admin. C. § 7504-4.11.2. Additionally, Delaware's Coastal Management Program Policies (the "Policies") identify specific considerations in evaluating a proposed project. The Policies require broad consideration of numerous coastal issues, including protection of coastal waters, the construction of marinas, the use of subaqueous lands, fish and wildlife, nongame and endangered species, etc.

b. Allegation That the Secretary's Order is Improper and the Reasons Why the Secretary's Order is Improper

11. Mr. Curran alleges that the Secretary's Order is improper, in that the Order is arbitrary and capricious, contrary to applicable law and fact, and is not supported by the record, and further alleges that the Secretary abused his discretion in issuing the Order. In support of these allegations, Appellant asserts as follows:

i. The Secretary's Order Demonstrates an Inadequate Review of the Application and Inadequately Addresses Public Comments

12. The Order is arbitrary and capricious, contrary to law, and an abuse of discretion in that it fails to adequately scrutinize the Application in accordance with 7 Del. Admin. C. § 7504, which is evidenced by the Order's failure to acknowledge and respond to important concerns raised by the public, including those raised by Mr. Curran.

13. The Administrative Code, at 7 Del. Admin. C. § 7504-4.6, requires DNREC to consider a number of potential impacts that may be imposed by a project on the public, including "[t]he potential effect on the public with respect to commerce, navigation, recreation, aesthetic enjoyment, natural resources, and other uses of the subaqueous lands." The Secretary failed to adequately consider such potential impacts of the DSPC Project on the public, and failed to sufficiently respond, and in some cases failed to respond at all, to a number of relevant concerns raised by the public.

14. 7 Del. Admin. C. § 7504-4.7 requires DNREC to consider the impact of a project on the environment, including the impact on recreation, such as boating and fishing, and the impact on aquatic life. The Secretary failed to adequately consider the potential impacts of the DSPC Project on the environment, including, in particular, failing to adequately consider the impact on recreational activities and to consider the impact of aspects of the project, such as recurrent future maintenance dredging, on the environment.

15. The Secretary's Order sets forth the Secretary's conclusion that DNREC's Technical Response Memorandum ("TRM") adequately responds to the areas of concern voiced by the public. This conclusion is incorrect, since the TRM fails to adequately respond to several significant concerns raised by the public. These failures demonstrate that the Order is incorrect and falls short of the requirements of §§ 7504-4.6 and 4.7. Accordingly, the issuance of the Order was arbitrary and capricious, an abuse of discretion and contrary to law in its failure to adequately consider and address the public's concerns.

16. According to the TRM, a number of public concerns were raised about navigational issues, both in terms of safety and in terms of the insufficiency of the studies provided by DSPC.

17. The TRM concludes that the DSPC Project will have minimal impact on ships as they transit the existing navigational channel. This conclusion ignores and fails to respond to the primary concern regarding the hazard posed by ships entering and exiting the proposed terminal

and using the turning basin to be established in the midst of the existing navigational channel, and instead incorrectly frames the questions as being one of whether the terminal (a stationary object along the bank) would affect ships moving up and down the channel. This framing wrongfully ignores the question of the hazard posed to river traffic from ships entering and exiting the terminal. As such, the Order and the TRM failed to effectively respond to this navigational and safety concern.

18. The Application documents submitted by DSPC contained a navigation study, entitled Full Mission Ship Simulation for Edgemoor Navigation Feasibility Study (the “Study”). The Study is full of inconsistencies, errors and omissions, which are detailed on pages 7-13 of Mr. Curran’s comments (See Exhibit B), which are incorporated herein by reference. The Order and the TRM failed to respond to any of these specifically stated concerns.

19. The Order and the TRM reference several documents that are dated after the close of the public comment period on December 1, 2020, and consequently were not made available to the public for comment. These include a March 4, 2021 letter from The Pilots’ Association for the Bay & River of Delaware, and a September 17, 2021 United States Coast Guard statement (whether written or oral is not clearly defined by the TRM). As these two items appear to have been pivotal to the Secretary’s decision on the navigation and safety concerns, they should have been made available for public notice and comment. The failure to do so warrants their exclusion from consideration and/or necessitates the rescission of the Permit pending a public notice and comment period on these items.

20. The TRM recognizes that concerns were raised over the loss of recreational fishing and crabbing resulting from the DSPC Project. The TRM takes the position that recreational opportunities will be preserved by limiting activities during the fish spawning season of March 15 through June 30 and by the compensatory mitigation actions proposed by DSPC to compensate for the loss of 5.5 acres of subaqueous lands. The TRM also notes that DNREC is requiring in-situ turbidity monitoring during port construction activities. Even in the aggregate, these three actions are insufficient to respond to the public’s concern over the loss of recreational fishing opportunities.

21. The TRM completely fails to address the loss of recreational opportunities from the presence of the proposed terminal and the entry and exit of ships into the terminal that will greatly interfere with the ability of other users of the river to enjoy the river. Small fishing boats like those used by Mr. Curran are no match for large container ships. While fishing boats may be able to easily and safely steer clear of larger ships that are traveling up and down the river, the location of the DSPC’s turning basin in the middle of the river channel poses a different and very significant safety hazard to recreational fishermen.

22. The information put forward by the TRM to respond to the concern over the loss of recreational fishing and crabbing is essentially non-responsive to those concerns. The limitation on activities during spawning season does not address the presence of the proposed terminal and its associated traffic entering and exiting the terminal on other users of the river. The compensatory mitigation activities are entirely unrelated to recreational fishing and crabbing, and in no way limit or address the loss of these recreational activities. The in-situ



turbidity monitoring is limited to dredging conducted during port construction, and does not apply to the continued and repeated dredging that will be required to maintain the port. As such, the in-situ turbidity monitoring is insufficient to protect the fish from the impacts of the dredging, and therefore does not limit the impacts of the proposed terminal on recreational fishing.

23. DSPC's Application relies on the assumptions that it will receive approval from the USACE for disposal of dredge spoils. However, no such approval has yet been received. The DSPC Application also fails to acknowledge the continuing need for maintenance dredging and disposal of those dredging spoils, or to provide any plan for handling such dredge spoils. As such, the Application is incomplete, and should have been rejected as such. The Order and the TRM entirely fail to respond to this concern expressed by the public, including Appellant.

24. The recurring need for substantial maintenance dredging was not acknowledged in DSPC's permit Application, and accordingly the environmental harm, interference with use and enjoyment of the river, including by fishermen, and increased navigational hazards posed by recurrent dredging are not addressed in the Application or in the Order and TRM. As such, the Order is defective in that it fails to acknowledge and respond to these concerns. This topic is also discussed more fully, below.

25. DNREC received a request for Section 401 Water Quality Certification ("WQ Certification") in connection with the DSPC Project on or around March 16, 2020. On or around May 20, 2020, DNREC, via letter to U.S. Army Corps of Engineers Philadelphia District, requested a 4-month extension of time with respect to the WQ Certification. In its letter, DNREC noted that the Application "represents a major activity in the State of Delaware, and one of, if not the largest, project that has ever been reviewed for impacts within subaqueous lands"; and further stating that the "size and scope of this project are unlike any other seen in the State of Delaware . . . and therefore extra time will be needed to evaluate the effects these activities will have on water quality." The agency further noted in its May 20 letter that the proposed project's magnitude of impacts to aquatic resources are "all well beyond the ordinary ranges of aquatic resource impacts that are typically permitted by the Department."

26. Based on information and belief, DNREC failed to act on the Section 401 WQ Certification request, which the Army Corps has interpreted as a waiver of DNREC's authority under Section 401. Indeed, in the Army Corps' November 10, 2021 Supplemental Public Notice concerning DSPC's proposed draft compensatory mitigation plan (See Public Notice No. NAP-2019-00278-86), Army Corps stated that "In accordance with Section 401 of the Clean Water Act, a Water Quality Certificate is required from the State government in which the work is located. Since DNREC did not act on that request within a reasonable period of time (not to exceed one year) as required by Section 401(a) of the Clean Water Act (33 U.S.C. 1341(a)(1)), this office determined that the Section 401 Water Quality Certification requirement has been waived for this project."

27. Despite DNREC's acknowledgment that the proposed project is of a magnitude that has never before been handled by the agency and for that reason DNREC needed additional time to evaluate the project's impacts on water quality, it appears that no such evaluation was



undertaken. DNREC's failure to review the application within the context of the WQ Certification request, resulting in what the Army Corps has interpreted as a waiver of DNREC's authority, rights and responsibilities under Section 401, created another critical information gap concerning the impacts of the proposed project on the water quality of the River and therefore on Mr. Curran's interests. If DNREC had needed more time to complete its evaluation of the WQ Certification, it could have denied the WQ Certification request or approved it with conditions. DNREC's apparent failure to act within a reasonable time with respect to the 401 WQ Certification was arbitrary and capricious, an abuse of discretion, and contrary to law.

ii. The Secretary's Order Improperly Relies on an Incomplete and Outdated Application in Approving the Permit

**285.** The Order is improper because it issues a permit to DSPC based on an incomplete and outdated application.

**296.** An applicant submitting an application for a Subaqueous Lands Act permit "shall provide the information requested in the appropriate application form." 7 Del. Admin. C. § 7204-3.1.1.2. The Regulations also require that "[t]he applicant shall maintain the application in a current state and notify the Department immediately of any changes to the information provided." 7 Del. Admin. C. § 7204-3.1.3. An Applicant, in completing the permit application form, must describe "What measures are being taken to reduce the frequency of dredging." Notably, under 7 Del. C. § 7207, the public is entitled to provide input on an application for a Subaqueous Lands Act permit once the application is "in proper form."

**3027.** A notable component of the Application was the proposed use of shoaling fans to limit and reduce sedimentation, and thus minimize the need for maintenance dredging. While the Secretary's Order states that shoaling fans are no longer being considered as part of the DSPC Project, the latest – and needless to say, outdated – version of the Application provides that "[s]hoaling fans are being pursued as means of reducing the frequency of dredging."

**3128.** There are now, therefore, significant substantive information gaps with respect to key aspects of DSPC's proposed operations. The record does not reflect how, if at all, DSPC now proposes to minimize the need for maintenance dredging without the shoaling fans, or to otherwise conduct the maintenance dredging that will now be required in the absence of the fans. There also is no information regarding where and how the maintenance dredged spoils will be disposed, nor is there information regarding who will be responsible for handling the maintenance dredging during certain timeframes.

**3229.** The change in the Applicant's plan to eliminate the use of the shoaling fans is not a *de minimis* change or minor technicality, but instead represents a significant change to the Application. DSPC's failure to submit an updated application and maintain such application in a "current state" with respect to shoaling fans does not meet the "proper form" requirement under applicable law.

**330.** Furthermore, beyond the procedural problems discussed above, the current record on which the Secretary's Order was based contains no studies or analyses regarding the impacts

of the annual maintenance dredging on the safety and recreational use of the Delaware River and Main Navigation Channel, including with respect to impacts to navigation and impacts to aquatic life in the River. Now that the shoaling fans are no longer part of DSPC's proposed plans, there are critical gaps regarding how the additional maintenance dredging that will now be required will comply with the criteria established by 7 Del. Admin. C. §§ 7504-4.6 thru 4.9, for example.

**341.** These gaps further highlight concerns regarding the project's potential impact on the surrounding environment and natural resources, both of which are inextricably linked to the public's – and Mr. Curran's – recreational use and enjoyment of the Delaware River. See Jones Declaration, Exhibit C.

**352.** In sum, the record on which the Secretary's Order was issued was insufficient to allow for a comprehensive evaluation and determination of the DSPC Project's potential impacts on the natural resources, and the public's recreational use, of the Delaware River, see 7 Del. Admin. C. § 7504-4.0, and is therefore arbitrary and capricious, an abuse of discretion, and contrary to law.

iii. DSPC's Compensatory Mitigation Plan is Insufficient

**363.** The DSPC mitigation plan is woefully inadequate to compensate the public for the loss of over 5.5 acres of the Delaware River. DNREC's approval of the mitigation plan is arbitrary and capricious, contrary to law, and an abuse of discretion.

**374.** DNREC regulations regarding the use of subaqueous lands require mitigation when subaqueous lands are destroyed. 7 Del. Admin. C. § 7504. The regulations place the burden on a permit applicant to provide for offset or mitigation for the loss. *Id.* at § 3.4. When considering a permit application for a subaqueous land permit, before it approves or issues the permit, DNREC must consider whether the applicant can provide mitigation to offset the losses to the public from the loss of subaqueous lands. *See* 7 Del. Admin. C. §§ 7504-4.6.7 and 4.7.4. DNREC regulations governing the control of water pollution define mitigation as a sequence of actions involving first the avoidance of impacts, followed by minimizing the magnitude of the relevant action to the minimum necessary to carry out the project, with compensation for the affected resource being used only as a last resort. 7 Del. Admin. C. § 7201-2.0.

**385.** When the waters of the state are lost due to a project, DNREC must require the permit applicant to provide for replacement of those waters. 7 Del. Admin. C. § 7201-5.10.1.7.3. Methods of compensation include the creation of new waters or the restoration of previously impacted waters. *Id.* at 5.10.1.7.3.1. Compensation for impacted waters of the state cannot be required at a ratio of greater than three times the area of the impacted waters. *Id.* at § 7201-5.10.1.7.3.3. In other words, for every acre of land affected by the project being permitted, up to three acres of mitigation can be required.

**396.** US EPA regulations generally require at least a one-to-one ratio of mitigation area to impacted area, and it is not unusual for greater than a one-to-one ratio to be required. *See*, e.g., 40 C.F.R. § 230.93(f).

~~4037.~~ The compensatory mitigation proposed by the DSPC and approved by DNREC is grossly inadequate. The DSPC Project will consume approximately 5.5 acres of subaqueous lands. As mitigation, DSPC will only be restoring a small wetland and funding certain DNREC projects and responsibilities. Collectively, these mitigation measures fall far short of being an adequate replacement for the loss of 5.5 acres of the Delaware River.

~~4138.~~ According to the Secretary's Order, DSPC will construct approximately one (1) acre of intertidal wetland. However, the actual mitigation plan approved by DNREC shows that the wetland may be less than to be created by DSPC will compromise only about one-eighth (1/8) of an acre, not one (1) acre. Instead of being at least a one-to-one ratio of lost subaqueous land to mitigation area, much more acreage will be lost than will be replaced by the wetland construction project, this ratio is an exceedingly poor 0.1275 to 5.5 ratio, or the equivalent of a 1:44 ratio. As such, to even bring the compensation area up to mere one-to-one ratio, the replacement area would need to be 44 times larger.

~~4239.~~ The second component of the mitigation is funding of a fisheries monitoring program under the operation and management of DNREC. In other words, DSPC will be providing funding for a DNREC project that DNREC could have funded itself, except that apparently DNREC has considered the project too low a priority to actually fund. Further, according to DNREC, one of the advantages of the monitoring program will be that it will eventually help DNREC collect fish management data from other water bodies. While this may be a positive result, it has nothing to do with mitigating the impacts of DSPC appropriation of 5.5 acres of the Delaware River.

~~430.~~ The third component of the mitigation is to install improvements at Fox Point State Park, including a walking trail and removal of vegetation. As Fox Point State Park is under the jurisdiction of DNREC, this is another instance of DSPC providing money to DNREC to fund a project that DNREC considers not important enough to fund itself.

~~441.~~ In both instances, DSPC has essentially proposed, and DNREC has approved, a pay-to-pollute solution, where DSPC is paying money to fund DNREC controlled projects in return for approval of its permit to take 5.5 acres of the Delaware River and its otherwise inadequate mitigation plan. Further, the portion of the mitigation plan that requires "substantial vegetation removal" along the length of Fox Point State Park adjacent to the Delaware River, appears to be an environmentally harmful project. While this is being proposed to provide a view of the river, the mitigation plan fails to address potential negative impacts of this work, including the risks of erosion and sedimentation that could result from the removal of vegetation along the shoreline.

~~452.~~ DSPC's Application and mitigation plan, and documents issued by DNREC in connection with approval of the permit and the mitigation plan, contain no information that would indicate that DSPC is unable to provide additional actual compensatory mitigation for the 5.5 acres of subaqueous lands that it will be using for its port project. As such, DSPC should be required to provide adequate compensatory mitigation for its use of the 5.5 acres of subaqueous lands. The approval of DSPC's mitigation plan was arbitrary and capricious, an abuse of discretion, and contrary to law.



iv. The Proposed DSPC Project Imposes Too Great a Burden on Appellant's Interests

463. The DSPC Project will unreasonably interfere with Mr. Curran's recreational use and enjoyment of the Delaware River – namely, fishing, boating, and swimming activities. The presence of the proposed terminal and the turning basin will place undue burdens on Appellant's activities and his ability to have full use and enjoyment of the river. The DSPC Project and ongoing maintenance dredging will cause a variety of adverse impacts to the environment and to natural resources, including but not limited to those related to water quality, air, and noise, as well as the health and presence of aquatic life, such as the finfish necessary for recreational fishing. See Jones Declaration, Exhibit C.

474. As stated on DNREC's website: "The Department of Natural Resources and Environmental Control (DNREC) envisions a Delaware that offers a healthy environment where people embrace a commitment to the protection, enhancement and enjoyment of the environment in their daily lives; where Delawareans' stewardship of natural resources ensures the sustainability of these resources for the appreciation and enjoyment of future generations."

485. Delaware regulations governing the use of subaqueous lands explain that "[s]ubaqueous lands within the boundaries of Delaware constitute an important resource of the State and require protection against uses or changes which may impair the public interest in the use of tidal or navigable waters." 7 Del. Admin. C. § 7504.

496. The Secretary's Order does not meet these purposes and standards, and the DSPC project places too great a burden on Mr. Curran's interests, as discussed above. As such, the Order is arbitrary and capricious, an abuse of discretion, and contrary to law.

III. Requested Relief

5047. For the reasons set forth above, Mr. Curran requests that the Board reverse and vacate the Secretary's Order and the issuance of the Permit and Certification.

IV. Estimated Witness and Hearing Information

5148. Mr. Curran anticipates calling 2-3 witnesses at the hearing in this matter, and estimates that such testimony may take a full day. Appellant reserves the right to examine any witnesses called or listed by DNREC or by any other party to this proceeding, including any consolidated appeals. Appellant further reserves the right to request reasonable discovery of DNREC in advance of the hearing, upon learning the identity of witnesses and evidence that DNREC may present.

5249. Mr. Curran reserves the right to assert additional grounds for appeal and reserves the right to amend this Statement of Appeal upon discovery of additional facts.

530. A \$50.00 deposit accompanied ~~ds~~ theis original Statement of Appeal filed on October 20, 2021, in accordance with the Board's regulations.

Respectfully Submitted,

/s/ Michelle M. Skjoldal

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*Attorneys for Appellant Walter F. Curran*

Dated: ~~January 20, October 20, 2022~~

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the *Amended Statement of Appeal of Walter F. Curran* was served this 20<sup>th</sup> day of January, 2022, on the following individuals, via first class mail and electronic mail:

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